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IN THE

Supreme Court of the United States

OCTOBER TERM, 1950

NO. 351

PITTSBURGH TERMINAL REALIZATION CORPORATION, Petitioner,

v.

WILLIAM G. HEINER, Trustee of Pittsburgh Terminal Coal Corporation, Debtor, Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Third Circuit.

REPLY BRIEF FOR PETITIONER.

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REPLY BRIEF FOR PETITIONER.

1. Petitioner accepts the challenge of the Securities and Exchange Commission on the issue of law.

The Securities and Exchange Commission, in its attempt to refute petitioner's argument that the reorganization court lacked jurisdiction to prevent amendment of its by-laws by enjoining the stockholders meeting called for that purpose, makes the following statement, apparently intended as *reductio ad absurdum* (SEC Br. 11-12):

> "As well might the petitioner argue that the reorganization court could not prevent removal of the provision of the charter for periodic reports to

security holders, a provision made mandatory by Section 216(12)(b)(2) of the Act."

Although the matter of periodic reports is not involved in the instant case, petitioner not only might but does so argue, and joins issue with the Securities and Exchange Commission on the question of the correctness of that argument. Furthermore, petitioner would willingly submit this case on that question as on a question certified, because it is, in principle, the basic question here involved.

Section 216(12)(b)(2) provides that:

> "A plan of reorganization * * * shall provide for the inclusion in the charter of the debtor, or any corporation organized or to be organized for the purpose of carrying out the plan, of * * * provisions with respect to the making, not less than once annually, of periodic reports to security holders * * *"

Thus, a plan which fails to provide for the inclusion of such provision for periodic reports in the charter cannot be confirmed by the court as being in conformity with the law requiring it; and a charter which fails to include such provisions cannot be approved by the court as being in conformity with the plan requiring it. But, when a plan is confirmed which contains the required provision, the Act is satisfied; and, when a charter is issued which contains the required provision, the plan is consummated. If, thereafter—say twenty years later—the stockholders of the successor corporation, unanimously or by appropriate majority, decided to dispense with periodic reports, for economy or other reasons, and took due corporate action in conformity with the law of the

state of incorporation to amend the charter to eliminate the provisions for periodic reports, would such action be enjoinable by the federal court which supervised the reorganization of the predecessor debtor corporation? The Securities and Exchange Commission so contends. This contention is tantamount to a construction of Section 216(12)(b)(2) so as to read:

> "The corporation shall make, not less than once annually, periodic reports. * * *"

Such a construction would be clearly repugnant to the Tenth Amendment of the Constitution as an attempt by the federal government to infringe on state sovereignty by regulating the internal affairs of state corporations, and this the framers of the Act were careful to avoid. Analysis of H.R. 12889, 74th Cong. 2d. Sess. (1936) 80.

Thus the issue, which is so squarely drawn between petitioner and respondents, is an issue which goes to the very basic and fundamental concept of Chapter X. A resolution of this issue by decision of the Supreme Court appears to be imperative.

2. Respondents' "facts" are neither relevant nor true.

Respondents, in their briefs in opposition, persist in their attempts to evade, confuse, and obscure the basic question at issue—that of the jurisdiction of the reorganization court—by citing so-called "facts"[1] to justify the exercise of jurisdiction by the court. But the

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[1] Most of respondents' "facts" were introduced into the record by *ex parte* affidavits "on information and belief" filed without notice *after* the order appealed from had been entered and *after* petitioner had perfected its appeal therefrom to the Court of Appeals. (Appee. 1a)

existence of facts which would justify the exercise of jurisdiction by a court possessing jurisdiction cannot create jurisdiction in a court which lacks it. Thus, because a federal court lacks jurisdiction in divorce, it cannot enter a decree in divorce, no matter how harrowing are the "facts" presented to it of indignities and abuse heaped on the innocent and injured spouse, which would justify the entry of a decree by a court possessing jurisdiction.

The "facts" cited by respondents to justify the exercise of a non-existent jurisdiction are not only irrelevant to the issue but they are not even facts. The so-called "facts" are a conglomeration of misrepresentations, distortions, half-truths, and innuendos calculated to present a deliberately false picture of the situation.

Following is an example of how respondents have presented the "facts" to this Court:

In his brief in opposition, Heiner repeats the following "fact" presented to the courts below (Heiner Br. 8):

> "that 1940 acres of undeveloped coal lands owned by the Reorganized Company and carried on its books at upwards of $100.00 per acre, were sold to four dominant stockholders including Alexander Guttmann, President and Chairman as aforesaid, for $10.00 per acre * * *",

carrying the obvious implication that the four stockholders had made secret profits at the expense of the corporation by purchasing from the corporation a valuable asset for one-tenth its value. The truth, as Heiner well knows and knew it to be, is that the purchase of the asset by the four stockholders was designed to benefit

the corporation, and did benefit it to the extent of more than $45,000, by the tax advantage resulting from the sale of a high cost asset at a low price; that the asset at the time of its sale to the stockholders was not, and has not since been, worth its selling price; that it was sold to the stockholders only after attempts to sell it to others by newspaper advertising and direct solicitation had failed; and that the circumstances of the sale were published in the 1946 annual report of the corporation sent to every stockholder of record. As far back as 1944, Heiner listed this same asset among the assets of the estate in the plan of reorganization, but assigned it no value, indicating in a footnote (Appt. 11a) that its value, if any, was doubtful.

Another "fact" cited by Heiner, which is false both in statement and implication, is the following (Heiner Br. 5):

> "that for several years Monroe Guttmann, son of Alexander Guttmann, the President and Chairman as aforesaid, had been paid salary of upwards of $12,000.00 per year as 'Assistant to the President';".

The direct misstatement lies in the fact, as Heiner knows and knew, that Monroe Guttmann never received salary of *upwards* of $12,000, and that he received $12,000 in only one year, 1948, and not *for several years*. His average annual salary during the five years he has been employed by petitioner has been $8200. But more important, the "fact" contains the intended false implication that Alexander Guttmann secretly padded the payroll of the corporation by adding his son thereto with a fictitious title. The actual fact, as respondents well know and knew, is that Monroe Guttmann, a certified

public accountant, has been rendering valuable services to the corporation as manager of the Pittsburgh office; that his employment, title, relationship to Alexander Guttmann, and salary were published in the annual report to the stockholders for 1945 and for every year since; and that Heiner and representatives of the Securities and Exchange Commission, during the years 1945 to 1949 inclusive, had numerous business contacts with Monroe Guttmann at the Pittsburgh office of the corporation and were aware of the nature and extent of the services he was rendering.

The foregoing are but instances to illustrate the manner in which respondents have presented the "facts". The true nature of every one of their "facts" could, if relevance required and space permitted, be similarly demonstrated by petitioner.

3. The Securities and Exchange Commission's brief in opposition misrepresents the record.

The Securities and Exchange Commission has misrepresented the record of the reorganization proceeding in an apparent attempt to bolster its untenable legal position. Its "Statement" contains the following (SEC Br. 4):

> "In its order of March 23, 1945, for consummation of the plan, the court approved the *proposed* certificate of incorporation and by-laws of the Realization Corporation. * * * The petitioner corporation was *then* formed * * *." (Emphasis added)

The certificate of incorporation, which the court approved in its order of consummation, made on March 23, 1945, was not a *proposed* certificate, but was one which

had been *theretofore* duly issued by the Commonwealth of Pennsylvania on December 28, 1944, and the order of March 23, 1945, so expressly states. (Appt. 19a - 20a) Similarly, the by-laws approved in the order of consummation were not *proposed* by-laws but were by-laws which had been *theretofore* duly adopted. And the petitioner corporation was not *then* formed; i.e., after entry of the order of consummation, but had been formed and in existence since December 28, 1944, the date that the certificate of incorporation issued.[2]

Thus, what actually occurred was this: On December 19, 1944, the court confirmed the plan of reorganization, which provided that the articles of incorporation and by-laws of the successor corporation should contain certain restrictive provisions. On December 28, 1944, the successor corporation was duly organized under the provisions of the Pennsylvania Business Corporation Law with articles of incorporation containing the restrictive provisions required by the plan, and by-laws were duly adopted likewise containing the required restrictive provisions. *Subsequently,* these articles and by-laws were submitted to the court for approval, and the court, on March 23, 1945, declared (Appt. 20a) that the articles and by-laws which *had been* adopted by the successor corporation were "in substantial compliance with the terms and provisions of the Plan". Thus, the portion of the plan requiring restrictions in the articles and by-laws of the successor corporation had been fully complied with and was, therefore, fully consummated. Had the successor corporation failed to include the re-

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[2] "Upon the issuance of the certificate of incorporation by the Department of State, the corporate existence shall begin, ..." Pa. Act of May 5, 1933, P. L. 364, Sec. 207; 15 Purdon Stat. Sec. 2852-207.

strictions in its articles and by-laws, then the court could have exercised its jurisdiction to protect its decree and enforce the plan, by refusing to approve the articles and by-laws as submitted and by directing that the proper provisions be included; for it is settled law that the reorganization court has jurisdiction after confirmation of the plan to enforce consummation. Between December 19, 1944, when the court ordered the plan confirmed, and March 23, 1945, when the court declared the plan consummated, the articles and by-laws of petitioner were under the court's jurisdiction. But after the latter date, the court having declared the provisions of the plan regarding the articles and by-laws of petitioner consummated, petitioner's articles and by-laws became subject only to its stockholders acting in conformity with law.

What the Securities and Exchange Commission apparently intended to accomplish by deliberately, and in the teeth of the record, adding the word "proposed", was to change the order of March 23, 1945, from an order approving the articles and by-laws which *had been* adopted and declaring the plan thereby consummated, to an order approving *proposed* articles and by-laws and directing them *to be* adopted, thus changing the order from an order of consummation, as it was plainly labelled, (Appt. 1a) to an order on confirmation.[3]

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[3] The actual order of confirmation had been entered on December 19, 1944. (Appt. 1a)

4. Petitioner's stockholders need "safeguards" to protect them from the trustee and not from their management.

In its argument maintaining that justice requires the exercise of jurisdiction by the bankruptcy court in this case, the Securities and Exchange Commission contends that (SEC Br. 11):

> "Otherwise, an entrenched management interested primarily in hanging on to their jobs may disregard the right of the minority to an early liquidation and prompt distribution of the proceeds, and may find it to their advantage to use the assets for speculative new ventures instead of adhering to a speedy disposal program."

Such is not the case here, as respondents well know, because over two-thirds of the so-called "minority" stockholders, not members of the so-called "Guttmann group" voted in favor of adopting the enjoined by-laws and voted to re-elect the same management after Heiner presented his "facts" to the court, and not a single stockholder has joined either Heiner or the Securities and Exchange Commission in the year that has passed since their attack on the management of the corporation. But assuming, *arguendo*, that such were the case, is not the danger of an entrenched management acting *ultra vires* present in every corporation? The laws and courts of Pennsylvania provide just as full relief and redress and "safeguards" to minority stockholders of a corporation which happens to be successor to a debtor corporation as to minority stockholders of any other corporation. If the "minority" stockholders of petitioner require the services of a trustee to protect them,

then so do the "minority" stockholders of every corporation.

But what "safeguards" do the stockholders, both majority and minority, of a successor corporation have against litigation and investigation instituted at their expense, but without request of any of them, by a reorganization trustee interested primarily in hanging on to *his* job?

5. Whose interest was the trustee serving in initiating this litigation?

The trustee, in answer to petitioner's contention that the trustee's intervention is unsolicited, states the following: (Heiner Br. 16)

> "Nowhere in his petition does the Respondent claim to be acting in behalf of the stockholders. * * * We think, however, that a Trustee in Bankruptcy has a clear duty to consider and protect the interest of all persons in the bankrupt estate, including creditors, stockholders, reorganized company and anyone else having an interest in and affected by the proceedings."

In applying this all-inclusive statement of the protective duties of a trustee to the instant case, we find that there are no creditors, they having been paid in full in cash; that Heiner expressly disclaims acting in behalf of stockholders; and that the reorganized company is his adversary. In whose behalf, then, *is* Heiner acting and to whom does he refer by "anyone else having an interest" in the proceedings? If he is thus obliquely referring to himself, petitioner submits that the interest of a trustee in perpetuating himself in an office he

has been enjoying for ten years is understandable, but not recognizable in law as an interest justifying the initiating of litigation.

But the interest of Heiner in initiating this litigation is apparently not so simple as that. Despite the fact that the court had entered the order of confirmation in December, 1944, the order of consummation in March, 1945, and the order granting *final* fees and allowances in the proceeding in September, 1945, Heiner, when he presented his petition for injunction and investigation more than four years later, in December, 1949, had not yet filed his account, nor had he paid over to petitioner the balance of funds remaining, as he was required to do by the plan (Appt. 9a) and by the order of March 23, 1945. (Appt. 24a) Petitioner is the beneficiary of that balance of funds which Heiner holds as fiduciary. By his attempt to prevent petitioner from taking action to extend its corporate existence, Heiner apparently sought to eliminate, by terminating its existence, the sole party in interest to object to his account when filed, and, failing that, Heiner apparently sought, by his "investigation" of petitioner and its management, to so harass and intimidate them that no objections to his account would be filed.[4] Here is the strange spectacle, indeed, of the fiduciary investigating the beneficiary before whom he must account.

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[4] On July 14, 1950, Heiner filed his account covering the period from March 13, 1942 to June 30, 1950. On September 29, 1950, petitioner filed its objections thereto, itemizing 175 items of exception and demanding that Heiner be surcharged in the sum of $462,293.24.

6. Petitioner's direct and straightforward procedure is denounced by respondents as "circumvention" and "evasion".

A mere examination of respondents' contention that petitioner's procedure to amend its by-laws by corporate action was an attempt to avoid petitioning the court for alteration of the plan is sufficient to reveal its absurdity. If the proposed amendments to the by-laws had been presented to the court as proposed alterations of the plan, the court would have, under Sec. 222 of the Bankruptcy Act, submitted the so-called alterations to the stockholders,[5] the sole parties in interest and the only parties that voted on the acceptance of the plan itself. But Sec. 222, in conjunction with Sec. 179, provides for approval of alterations by mere majority vote of stockholders, and Sec. 223 provides that failure to file written rejection of alterations shall be deemed acceptance. Under the procedure petitioner actually followed in accordance with its by-laws, the adoption of the amendments to the by-laws required an *affirmative* two-thirds vote of the *same* stockholders. Thus, petitioner is accused by respondents of "evading" a procedure requiring only non-rejection by a mere majority of its stockholders for approval, by adopting a procedure requiring the affirmative vote of two-thirds of its stockholders for approval.

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[5] Cf. *Knight v. Wertheim*, 158 F. 2d 838.

7. The disposition of petitioner's property is a matter for its stockholders and not for respondents.

Respondents' argument that the proposed amendments would "defeat" the plan likewise falls upon inspection. Respondents complain that petitioner may not liquidate fast enough, but they fail to make clear for whom the liquidation would not be fast enough. All allowed creditors of the debtor have been paid in full, and petitioner has but a single class of stockholders. If petitioner, who has clear legal title to its property, with the approval of its stockholders, who are the equitable owners of the property, should choose to liquidate that property more slowly and thereby obtain higher prices, what would be "defeated"? Surely, the stockholders of petitioner have the right, by appropriate corporate action, to dispose of their corporation's property in accordance with their judgment, without having to satisfy the Securities and Exchange Commission and the reorganization trustee as to the correctness of their judgment.

Respectfully submitted,

LEONARD H. LEVENSON
Attorney for petitioner

APPENDIX.

BANKRUPTCY ACT, CHAPTER X, 52 Stat. 840, 883 (11 U.S.C. 601, *et seq.*):

Sec. 179. After a plan has been accepted in writing, filed in court, by or on behalf of creditors holding two-thirds in amount of the claims filed and allowed of each class, and, if the debtor has not been found to be insolvent, by or on behalf of stockholders holding the majority of stock, of which proofs have been filed and allowed, of each class, exclusive of creditors or stockholders or of any class of them who are not affected by the plan or whose claims or stock are disqualified pursuant to section 203 of this Act, or for whom payment or protection has been provided as prescribed in paragraphs (7) and (8) of section 216 of this Act, the judge shall fix a hearing, upon notice to the debtor, creditors, stockholders, indenture trustees, the Secretary of the Treasury, the Securities and Exchange Commission, and such other persons as the judge may designate, for the consideration of the confirmation of the plan and of such objections as may be made to the confirmation.

* * * * * * *

Sec. 222. A plan may be altered or modified, with the approval of the judge, after its submission for acceptance and before or after its confirmation if, in the opinion of the judge, the alteration or modification does not materially and adversely affect the interests of creditors or stockholders. If the judge finds that the proposed alteration or modification, filed with his approval, does materially and adversely affect the interests of creditors or stockholders, he shall fix a hearing for the consideration, and a subsequent time for the acceptance

or rejection, of such alteration or modification. The requirements in regard to notice of hearing, to submission to the Securities and Exchange Commission, to acceptance, to filing and hearing of objections to confirmation and to the confirmation, as prescribed in article VII of this chapter in regard to the plan proposed to be altered or modified, shall be complied with.

Sec. 223. Any creditor or stockholder who has previously accepted the plan proposed to be altered or modified and who does not file a written rejection of the proposed alteration or modification within the time fixed by the judge, shall be deemed to have accepted the alteration or modification and the plan so altered or modified unless the previous acceptance provides otherwise.